IN THE SUPREME COURT OF MISSOURI

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| JAMES L. DRURY, et al., | ) | |
| | ) | |
| Plaintiffs/Respondents/Cross-Appellants, | ) | |
| | ) | |
| v. | ) | No. 83901 |
| | ) | |
| CITY OF CAPE GIRARDEAU, MISSOURI, | ) | |
| | ) | |
| Defendant/Appellant/Cross-Respondent. | ) | |

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**SUBSTITUTE SECOND BRIEF OF**
**APPELLANT CITY OF CAPE GIRARDEAU**

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Appeal from the Circuit Court of Cape Girardeau County
The Honorable Robert C. Stillwell, Presiding

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## JURISDICTIONAL STATEMENT

The plaintiffs have adopted the City's jurisdictional statement, yet argue that the Court lacks jurisdiction over this appeal on the theory that the trial court failed to rule on one of the plaintiffs' four motions for summary judgment. This contention ignores the record. The judgment at issue in this matter is final and appealable because it disposes of every issue before the trial court. The City demonstrated this fact in the jurisdictional statement of its brief in the court of appeals, which the plaintiffs explicitly adopted in their brief before that court. The trial court explicitly stated that its judgment was final. The finality of the judgment is also demonstrated by the fact that the plaintiffs have filed a cross appeal from it. The plaintiffs' argument that the judgment is not final must be rejected.

"The rule, well founded in reason and law, is that a judgment is final that disposes of all issues as to all parties, leaving nothing for future determination." *Magee v. Blue Ridge Professional Bldg. Co.,* 821 S.W.2d 839, 842 (Mo. banc 1991). The judgment in this case is final because it resolves all claims as to all of the parties. *See Snelling v. Masonic Home,* 904 S.W.2d 251, 252 (Mo. App. 1995).

Every claim for relief asserted in the trial court was resolved by the trial court's judgment. The plaintiffs' second amended petition was in eight counts. Count I contained general allegations and did not pray for any relief. Legal File ("L.F") at 28-30. The trial court entered summary judgment in favor of the City on Counts II, III, IV, VI, VII, and VIII. L.F. at 367. The trial court entered summary judgment in favor of the plaintiffs on Count V. L.F. at 367. The trial court's order denying the plaintiffs' motion

for new trial explicitly states that the trial court "deems the Court's Judgment entered in this cause as final pursuant to Rule 81.05." L.F. at 388.

On December 1, 2000, the plaintiffs filed a notice of cross-appeal. L.F. at 389. In its brief before the court of appeals, the City included a jurisdictional statement demonstrating that all issues before the trial court had been resolved and that this Court had jurisdiction over the appeal. Appellant's Brief at 7. The plaintiffs explicitly adopted this jurisdictional statement. Respondents' Brief at 3.

From these undisputed facts, there can be no doubt that the judgment of the trial court resolves all issues as to all parties and leaves nothing for future determination. Therefore, the judgment is final and appealable. *Magee*, 821 S.W.2d at 842; *Snelling*, 904 S.W.2d at 252.

The plaintiffs assert that the trial court failed to resolve one of their motions for summary judgment. This contention is refuted by the record. The City filed a motion for summary judgment directed to all of the plaintiffs' claims. L.F. at 91. The plaintiffs filed four motions for "partial" summary judgment. L.F. at 45, 168, 195, 305. One of the plaintiffs' motions asserted that the City's Ordinance 2403 imposed an illegal sales tax. L.F. at 168. The City noted that this claim should be rejected because it was not asserted in the plaintiffs' petition. L.F. at 293.

The trial court took up all of the parties' motions for summary judgment and entered a judgment that, as noted above, resolved all issues as to all parties: "The Court has considered the parties' Motions for Summary Judgment and supporting documentation concerning the Plaintiffs' Petition for Declaratory Judgment and

Injunctive Relief and after reviewing the undisputed facts set before this court orders as follows." L.F. at 366-67.

The plaintiffs make the unsupported claim that the judgment appears not to have resolved the sales-tax motion for summary judgment. This contention is refuted by the plain language of the judgment itself, which explicitly states that the trial court took up and resolved all of the parties' motions. L.F. at 366-67. Furthermore, the plaintiffs themselves recognized that the sales-tax motion had been resolved in their motion for new trial. L.F. at 375, 380. In their post-judgment motion, the plaintiffs requested the trial court to reconsider its decision "that in fact there was no sales tax. . . . We respectfully request that the court reconsider its ultimate finding with regard to the 'sales tax' issue and grant summary judgment because of the failure of the ordinance (2403) to contain the words 'sales tax' in either the title or the text." L.F. at 380. The plaintiffs should not be heard to assert that that the sales-tax issue remains unresolved when they admitted the contrary in the trial court.

Furthermore, the order denying the plaintiffs' post-judgment motion explicitly states that the trial court had determined all pending issues when it declares that the trial court "deems the Court's Judgment entered in this cause as final pursuant to Rule 81.05." L.F. at 388. Subsequent to this order, the plaintiffs recognized the finality of the judgment by filing a notice of appeal and by adopting the City's jurisdictional statement.

The only authority cited by the plaintiffs in support of their contention that the Court lacks jurisdiction is *Avidan v. Transit Casualty Co.*, 20 S.W.3d 521 (Mo. banc 2000). *Avidan* merely holds, however, that a judgment lacks finality if it "does not

finally dispose of [a plaintiff's] claims against [a defendant]." *Id.* at 524. As demonstrated, the judgment in this case took up all of the parties' motions for summary judgment and disposed of every claim advanced by the plaintiffs. Under the analysis in *Avidan*, the Court possesses jurisdiction over this appeal.

## STATEMENT OF FACTS

With a few exceptions, the plaintiffs have adopted the statement of facts in the City's substitute brief. Of relevance to the issues remaining on appeal, the plaintiffs dispute a sentence in the statement of facts: "Ordinance 2403 amends section 15-397 of the City's Code of Ordinances by increasing the license tax on hotels and motels from 'three (3) percent of gross receipts derived from transient guests for sleeping accommodations' to 'four (4) percent.'" Appellant's Substitute Brief at 10. The plaintiffs assert that "use of the word 'amends' is a substantial departure from what really occurred." Respondents' Substitute Brief at 10. The plaintiffs ignore the fact that the title of Ordinance 2403 ***explicitly*** states that it is an ordinance "amending the city code." L.F. at 115. The plaintiffs then go on repeatedly to ***quote*** this language in their brief. Respondents' Substitute Brief at 41, 59, 84. There can be no doubt that Ordinance 2403 was enacted as an amendment.

## ARGUMENT

As discussed in the City's substitute brief and the multiple amicus briefs, this is a case that could have significant and longstanding repercussions if the Court were to embrace the erroneous theories set forth by the plaintiffs and adopted by the trial court. The plaintiffs dismiss the concerns raised by the City and echoed in the amicus briefs of the Missouri Municipal League, the City of St. Louis, the City of Kansas City, the Attorney General, and Southeast Missouri State University.

The plaintiffs declare that there is no risk that other ordinances will be affected by this case, suggesting that there was no increase in suits seeking to invalidate local ordinances after the Court declared an ordinance invalid in *ACI Plastics, Inc. v. City of St. Louis*, 724 S.W.2d 513 (Mo. banc 1987). The plaintiffs ignore the fact that they are trying to change the law set forth in *ACI* and the Court's other single-subject/clear-title cases. The plaintiffs do not argue for the application of the Court's settled standards for reviewing such enactments. Rather, they seek a new rule requiring every element of every ordinance to be set forth verbatim in the ordinance's title. Missouri law has never contained such a requirement, and if the Court were to create one, a host of existing ordinances would become invalid.

Under *ACI* and the other Missouri cases discussed by the parties, the ordinance at issue in this case is fully in conformity with the single-subject/clear-title provision of the City Charter. The Court should reject the plaintiffs' invitation to alter these settled standards.

In arguing that the trial court did not err in granting partial summary judgment in their favor, the plaintiffs essentially rely on three relevant cases. *See 508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823, 828 (Mo. 1965); *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994); *ACI Plastics, Inc. v. City of St. Louis*, 724 S.W.2d 513 (Mo. banc 1987). Yet the plaintiffs ignore the fact that each of these cases was discussed in the City's brief, and the plaintiffs make no effort to address the City's arguments or the other cases cited by the City. The plaintiffs rely on no other authority relevant to the single-subject/clear-title issue that is at the heart of this case.

As extensively explained in the City's initial brief as well as the amicus briefs, and for the reasons that follow, the trial court's partial summary judgment in favor of the plaintiffs must be reversed.

## I. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS ON THE THEORY THAT ORDINANCE 2403 VIOLATED SECTION 3.14 OF THE CITY CHARTER AND ARTICLE III, SECTION 23, OF THE MISSOURI CONSTITUTION AND THE JUDGMENT SHOULD BE REVERSED IN PART IN THAT (A) BY ITS TERMS, SECTION 3.14 DOES NOT APPLY TO ORDINANCES THAT REVISE EXISTING ORDINANCES AND THE UNDISPUTED FACTS SHOW THAT ORDINANCE 2403 REVISES THE EXISTING ORDINANCE, (B) ORDINANCE 2403 DOES NOT VIOLATE THE SINGLE SUBJECT/CLEAR TITLE PROVISION EMBODIED IN SECTION 3.14 BECAUSE ALL OF THE MATTERS IN ORDINANCE 2403 RELATE TO THE SAME SUBJECT OF A LICENSE TAX AND THE TITLE OF THE ORDINANCE CLEARLY EXPRESSES THE SUBJECT, AND (C) ARTICLE III, SECTION 23, OF THE MISSOURI CONSTITUTION APPLIES ONLY TO LEGISLATION ENACTED BY THE GENERAL ASSEMBLY AND NOT TO LOCAL ORDINANCES.

As explained in the City's initial brief and in the amicus briefs, the judgment of the trial court must be reversed to the extent that it grants summary judgment to the plaintiffs. Contrary to the plaintiffs' argument, Ordinance 2403 is fully in conformity with the single-subject/clear-title provision of the City Charter. This Court should reverse the judgment of the trial court to the extent that it finds in favor of the plaintiffs and enter judgment in favor of the City on all claims.

The plaintiffs' substitute brief does not follow the order of the argument in the City's initial brief. The plaintiffs have managed to turn the City's two points relied on, and a single point on cross appeal, into eight points relied on. For clarity, this brief retains the order employed in the City's initial brief.

The plaintiffs' Point I (a baseless argument that a four-sevenths vote was required to approve the project at issue) is addressed below in subpoint F. The plaintiffs' Points II and III, relating to the single-subject/clear-title issue, are addressed below in subpoint C. The plaintiffs' Point IV, relating to whether the single-subject requirement is even applicable to Ordinance 2403, is addressed below in subpoint B. The plaintiffs' Point V, relating to whether the plaintiffs made any showing to negate the City's affirmative defense of estoppel, is addressed in the City's Point II. The plaintiffs' Point VI, claiming that the trial court failed to rule on a motion for summary judgment, is addressed below in subpoint I. The plaintiffs' Point VII, relating to whether the plaintiffs made a timely effort to contest the result of an election, is addressed below in subpoint E. The plaintiffs' Point VIII, addressing whether the City properly discussed the analysis of the court of appeals, is addressed below in subpoint C.

**A. Standard of review.**

The plaintiffs do not dispute that the entry of summary judgment is to be reviewed de novo without deference to the legal conclusions of the trial court. *Eisenberg v. Redd,* 38 S.W.3d 409, 410 (Mo. banc 2001); *Huber v. Magna Bank,* 959 S.W.2d 812 (Mo. App. 1997); *ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993).

### B. Ordinance 2403 need not be confined to a single subject.

In their Point IV, the plaintiffs argue that Ordinance 2403 is subject to section 3.14 of the Cape Girardeau City Charter. Section 3.14 provides: "No ordinance ***except those . . . codifying or revising existing ordinances*** shall contain more than one (1) subject, which shall be clearly expressed in its title." L.F. at 130 (emphasis added). The undisputed facts show that, on its face, Ordinance 2403 is "an ordinance amending Chapter 15 of the City Code" of ordinances, specifically section 15-397 of the Ordinance Code. L.F. at 115. As explained in the City's initial brief, the ordinance therefore falls within section 3.14's exception for ordinances that revise existing ordinances. Ordinance 2403 need not contain only one subject, or express the entirety of its subject matter within its title.

In their argument on this issue, the plaintiffs would have the Court reject the settled rule that, in construing Missouri legislative enactments, words and phrases are given their plain and ordinary meaning, which is generally derived from the dictionary. *Akers v. Warson Garden Apartments*, 961 S.W.2d 50, 53 (Mo. banc 1998); *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 809 (Mo. banc 1998). It is a basic rule of statutory construction that, when the meaning of a statute is in question and the legislature has not provided a definition, words and phrases are given their plain or ordinary meaning. § 1.090 RSMo.

The plaintiffs do not dispute that, according to both legal and standard dictionaries, "amend" and "revise" are synonymous terms. *See* Black's Law Dictionary 80 (6th ed. 1990) (defining "amend" to mean "change, correct, revise"); *id*. at 1321

(defining "revise" to mean "go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it"); Webster's New World Dictionary 19 (2d college ed. 1984) (defining "amend" to mean "to change or revise (a law, etc.)); *id*. at 512 (defining "revise" to mean "to change or amend").

The plain meaning of "revising existing ordinances" includes changing or amending them. Because Ordinance 2403 explicitly revises, changes, and amends an existing ordinance, it need not be confined to a single subject. Under its plain and ordinary meaning, section 3.14 does not apply to Ordinance 2403.

The plaintiffs argue that "revising" as used in section 3.14 of the City Charter can ***only*** mean "to number, compile or whatever." Respondents' Substitute Brief at 75-76. They note that section 3.18 of the City Charter provides that, from time to time, city ordinances "shall be revised, codified and promulgated according to a system of continuous numbering and revision." *See* L.F. at 131.

The plaintiffs have made no showing that any of the usual meanings of "revising" as used in the City Charter is exclusive. It is undisputed that one meaning of "revise" in connection with legislative enactments is to examine them for the purpose of rearranging and codifying them. *See* Black's Law Dictionary at 1321. The plain and ordinary meaning of "revise" indisputably includes this definition, in addition to the sense of being synonymous with changing or amending legislative enactments. *See* Black's Law Dictionary at 80, 1321; Webster's New World Dictionary at 19, 512. Under the settled law of this state, when section 3.14 refers to ordinances "codifying or revising existing ordinances," it refers both to (1) ordinances changing or amending existing ordinances as

well as to (2) ordinances rearranging and codifying existing ordinances. Certainly, the plaintiffs have cited no authority for their contention that one plain and ordinary meaning of "revising" must be ignored in favor of another.

Notably, section 3.14's single-subject/clear-title requirement explicitly does not apply to ordinances "codifying ***or*** revising" existing ordinances. L.F. at 130 (emphasis added). Codifying, therefore, must mean something different from revising. Section 3.18 provides that city ordinances "shall be revised, codified ***and*** promulgated according to a system of continuous numbering and revision." *See* L.F. at 131 (emphasis added). Thus, when the City Charter refers in Section 3.18 to the effort "to number, compile or whatever" that the plaintiffs address, it uses the words "revise" and "compile" in the conjunctive. Section 3.14, by contrast, refers disjunctively to ordinances that ***either*** revise ***or*** compile existing ordinances. This shows that the City Charter considers revising and compiling to be separate actions in the context of Section 3.14. Therefore, by its terms, Section 3.14 does not apply to (1) ordinances arranging existing ordinances in a code ("compiling") ***or*** (2) amending or changing existing ordinances ("revising").

As noted in the City's initial brief, the plaintiffs' cited cases merely hold that the committee that edits the Missouri Revised Statutes lacks legislative authority and therefore lacks the power to make substantive changes to an enactment. *See Protection Mutual Ins. Co. v. Kansas City*, 504 S.W.2d 127, 130 (Mo. 1974); *Kansas City v. Travelers Ins. Co.,* 284 S.W.2d 874, 878 (Mo. App. 1955). These cases are not relevant to any issue in this appeal in that it is undisputed that the Cape Girardeau City Council has legislative authority.

The trial court's ruling in favor of the plaintiffs should be reversed because Ordinance 2403 was enacted for the purpose of revising an existing ordinance. Thus, the single-subject/clear-title provision of the City Charter is inapplicable.

**C. Ordinance 2403 pertains to a single subject clearly expressed in its title.**

In their Points II and III, the plaintiffs assert that Ordinance 2403 violates section 3.14 of the City Charter. In support of this baseless contention, the plaintiffs principally rely on three cases discussed at length in the City's brief which do not support the plaintiffs' claims. The plaintiffs ignore the multitude of other authority cited by the City and the amici demonstrating that Ordinance 2403 contains only one subject clearly expressed in its title. The plaintiffs' efforts to evade the authority relied on by the City and the amici demonstrate the weakness of the plaintiffs' position.

Initially, the plaintiffs appear to believe that Ordinance 2403 should be presumed to be invalid. This is entirely contrary to the settled law. Rather, as shown by the plaintiffs' own cited authority, any doubts as to the procedural and substantive validity of a legislative act must be resolved in favor of validity. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). Attacks against legislative action founded on procedural limitations are not favored, and such limitations are to be interpreted liberally, so that an attack must fail unless the legislation clearly and undoubtedly violates the limitation. *Id.* This Court has consistently avoided an interpretation that will "limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law." *Id.* Thus, in reviewing this case, the Court must bear in mind that the plaintiffs' claims are not favored and that the plaintiffs bear a heavy burden.

The plaintiffs attempt to ignore the heavy burden that the law places on them by declaring that tax measures must be strictly construed in favor of the taxpayer. This is nonsense. The plaintiffs' single-subject/clear-title claims do not require any construction of the terms of the ordinance. Their arguments would be the same if Ordinance 2403 related to zoning or garbage collection or any other topic.

The plaintiffs' reliance on *508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823 (Mo. 1965), is badly misplaced. Rather than supporting their position, *508 Chestnut* demonstrates why the judgment of the trial court must be reversed to the extent that it was in favor of the plaintiffs. As explained at length in the City's initial brief, the ordinance in *508 Chestnut* went into exhaustive detail about a city license fee, including complex definitions and procedures that were not mentioned in the ordinance's title. *Id.* at 828.

As in this case, the plaintiff in *508 Chestnut* asserted that the ordinance did not contain a title that clearly expressed the subject of the ordinance. The Court easily rejected this claim, holding that no one would be imposed upon, misled, deceived, or surprised by the enactment of the ordinance under its title: "It is an honest title, revealing the one and only general subject of the ordinance–the licensing and regulating of specified businesses and professions, including hotels and motels. The licensing of hotels and motels is germane to the subject. Every provision . . . is germane, that is, closely allied, fit and appropriate, and of a similar nature to the subject expressed in the title." *Id.*

In their brief, the plaintiffs ignore the fact that the *508 Chestnut* Court rejected a claim effectively identical to one advanced by the plaintiffs in this case. The plaintiffs in

this matter claim that every provision of Ordinance 2403 is a separate subject that was required to be set forth in the title. This Court dismissed a similar claim in *508 Chestnut*: "In its reference to hotels and motels the title does not descend into particulars, and therefore its failure to include a reference to the sworn statements of receipts to be filed with the comptroller or the variance between the expiration dates of licenses granted to hotels and motels and those granted to other businesses, or other details, is not fatal to the ordinance." *Id.*

The plaintiffs in this case, like the plaintiffs in *508 Chestnut*, assert that the title of an ordinance is insufficiently clear. *508 Chestnut* and the undisputed facts of this case, however, refute this claim. This is the title of Ordinance 2403:

> AN ORDINANCE AMENDING CHAPTER 15 OF THE CITY CODE INCREASING AND EXTENDING THE HOTEL/MOTEL/RESTAURANT LICENSE TAX AND CALLING AN ELECTION IN THE CITY OF CAPE GIRARDEAU, MISSOURI, ON THE QUESTION OF WHETHER TO APPROVE THOSE AMENDMENTS; DESIGNATING THE TIME OF HOLDING THE ELECTION; AUTHORIZING AND DIRECTING THE CITY CLERK TO GIVE NOTICE OF THE ELECTION.

L.F. at 115.

The provisions of Ordinance 2403 pertain to a single subject: the amendment of Chapter 15 of the city code to increase and extend the licensing tax for hotels, motels, and restaurants. The alleged additional "subjects" suggested by the plaintiffs are not distinct subjects, but provisions within the ordinance that relate to the ordinance's general subject matter. Ordinance 2403 includes provisions on the subject noted in its title by describing the amount of the tax increase, the duration of the extension, the proposed use of the tax proceeds, conditioning the use of the tax proceeds on the execution of an intergovernmental agreement for the project to be funded by the tax, and calling for an election pursuant to the City Charter to approve the tax increase. *508 Chestnut* shows that the inclusion of these details in the body of the ordinance does not result in a defective title.

As noted in the City's initial brief, under the plaintiffs' theory, all ordinances must have titles repeating word for word their entire contents. *508 Chestnut* shows that Missouri law does not impose such a ridiculous requirement.

The only other single-subject/clear-title cases relied on by the plaintiffs in their Points II and III are *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994), and *ACI Plastics, Inc. v. City of St. Louis,* 724 S.W.2d 513 (Mo. banc 1987). As explained in the City's initial brief, *Hammerschmidt* merely holds that a statute violates the single-subject rule of the Missouri Constitution if it contains provisions amending election statutes ***and*** completely unrelated provisions creating a new form of county government. 877 S.W.2d at 103. Similarly, in *ACI,* an ordinance was held to violate the single-subject requirement of a city charter in that it dealt with two entirely unrelated

revenue measures: "The sales tax and the employer's fee are completely different subjects." 724 S.W.2d at 516. In this case, by contrast, Ordinance 2403 only includes provisions relating to the one subject noted in its title, "the increase and extension of the hotel/motel/restaurant license tax."

The Court may note that the plaintiffs' brief ignores the Court's most recent pronouncements on the single-subject/clear-title issue, *C.C. Dillon Co. v. City of Eureka,* 12 S.W.3d 322 (Mo. banc 2000). In that case, the Court held that an enactment "relating to transportation" could properly contain billboard regulations, even though billboards were nowhere mentioned in the title. *C.C. Dillon* holds that the title of an enactment must "indicate in a general way the kind of legislation that was being enacted." Id. (quoting *Fust,* 947 S.W.2d at 429). "The title to a bill need only indicate the general contents of the act." *Id.* (quoting *Westin Crown Plaza Hotel Co. v. King,* 664 S.W.2d 2, 6 (Mo. banc 1984)). Particularly relevant to this case, the Supreme Court held that ***the title need not describe every detail contained in the bill.*** *Id.* (quoting *Fust,* 947 S.W.2d at 429). The plaintiffs' claim in this case (that every minute provision of Ordinance 2403 must be set forth in its title) is squarely contrary to *C.C. Dillon*. It is no wonder that the plaintiffs refuse to address the case.

The plaintiffs mention *Fust v. Attorney General,* 947 S.W.2d 424 (Mo. banc 1997), exactly once but fail to discuss it. *Fust* is another case cited by the City, in which the Court rejected an argument that a provision contained more than one subject because it related to regulation of liability insurance carriers, modification of tort liability for manufacturers, pre-judgment interest, procedure in trials involving punitive damages, and

establishment of a tort victims' compensation fund. The Court explained that the single-subject test is not whether individual provisions of a bill relate to ***each other***, but whether they fairly relate to the general subject of the bill. *Id.* The plaintiffs make no effort to distinguish *Fust*, which highlights the fact that their arguments are empty and baseless.

The plaintiffs also ignore *Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n,* 973 S.W.2d 851 (Mo. banc 1998), *Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. banc 1996), *Mid-State Distributing Co. v. City of Columbia,* 617 S.W.2d 419 (Mo. App. 1981), *Ruggeri v. City of St. Louis,* 441 S.W.2d 361 (Mo. 1969); *Westin Crown Plaza Hotel Co. v. King,* 664 S.W.2d 2 (Mo. banc 1984), and *National Solid Waste Management Ass'n v. Director, Dept. of Natural Resources*, 964 S.W.2d 818 (Mo. banc 1998). In each of these cases, as demonstrated in the City's initial brief, the courts rejected claims identical to those advanced by the plaintiffs.

The cases cited above are clear authority demonstrating that the judgment of the trial court must be reversed. *Mid-State* and *Ruggeri* are particularly relevant in that they dealt with (and rejected) claims exactly the same as those advanced by these plaintiffs in the context of clear-title provisions applicable to city ordinances. The plaintiffs' silence in the face of this overwhelming authority demonstrates the intellectual bankruptcy of their argument. Ordinance 2403 does not violate Section 3.14 of the City Charter. The judgment of the trial court must be reversed to the extent that it found for the plaintiffs on this point.

The plaintiffs devote Point VIII of their brief to the argument that the City's initial brief should not have pointed out the errors in the opinion of the court of appeals in this

case. The City agrees wholeheartedly with the plaintiffs' assertions that this case is to be heard in this Court as an original appeal and that the opinion of the court of appeals is vacated and of no precedential value upon transfer to this Court. However, the plaintiffs cite no authority in support of their contention that it is an "improper argument" to explain the reasons why the lower court was in error. Certainly, it can be beneficial to the Court to discuss the analysis of another tribunal that has addressed the same case. *See* Daniel P. Card & Thomas M. Blumenthal, 17 Mo. Practice § 83.08-3 (1998).

What is more notable is that the plaintiffs have made no effort to show that the lower court's analysis was correct. The opinion of the court of appeals failed to address the same authorities that the plaintiffs fail to address in their brief before this Court. The plaintiffs' refusal to defend the court of appeals shows that that the opinion below was in error.

**D. There is no constitutional violation.**

The plaintiffs do not dispute that Article III, Section 23, of the Missouri Constitution has no application to local ordinances. The trial court indisputably erred in declaring Ordinance 2403 to be "constitutionally void." L.F. at 373-74.

**E. The result of the election called for in Ordinance 2403 is valid.**

In their Point VII, the plaintiffs argue that the City should not have noted in its initial brief that the result of the election called for in Ordinance 2403 is valid. As the City noted, section 115.577 of the Missouri Revised Statutes requires that any action brought to contest an election must be brought within thirty days after the official announcement of the election result. The plaintiffs filed this action on April 5, 1999,

several months after the November, 1998, election in which the City's voters approved the ordinance. As the City noted, the plaintiffs' challenge to the election was not timely filed. *Clark v. City of Trenton*, 591 S.W.2d 257, 259-60 (Mo. App. 1979); § 115.577, RSMo. Therefore, their assertion that the election is void must fail.

The plaintiffs claim that the City should have mentioned *Clark* and section 115.577 in a point relied on. This contention is incorrect for several reasons. First, the City does not seek relief from any action of the trial court in regard to the election result because the trial court never declared the election invalid. While the plaintiffs have alleged without citation to authority that the election is invalid, L.F. at 10 (¶ 22); L.F. at 19 (¶ 20); L.F. at 40 (¶ 30), in their multiple prayers for relief they have never prayed for a judicial declaration that the election should be set aside. L.F. at 10, 22, 33, 35, 37, 40, 41, 42, 43. Therefore, the election result remains in force and the City had no need to include this issue in a point relied on.

Second, the City cannot waive this jurisdictional issue. Election contests are purely statutory proceedings. The jurisdiction of the circuit court in these matters is confined strictly to the provisions of Chapter 115 of the revised statutes governing elections and election contests. *Board of Election Comm'rs v. Knipp,* 784 S.W.2d 797, 798 (Mo. banc 1990). A court is constrained by the statutes, and the letter of the law is the limit of its power. *State ex rel. Bonzon v. Weinstein*, 514 S.W.2d 357, 362 (Mo. App. 1974). The failure to assert a claim relating to the validity of an election within thirty days is jurisdictional. *Clark;* § 115.577. Jurisdictional issues may be raised at any time,

including by the Court sua sponte. To any extent that the trial court's actions could be seen to relate to the validity of the election, those actions are void.

Similarly, the plaintiffs complain in their Point VII that the City should not have pointed out that, if the title of an enactment is found to be defective, the portions of the enactment found to be outside the scope of the title should be severed, with the balance of the act to remain in force. *See Hammerschmidt; National Solid Waste Management; City of St. Louis v. Breuer*, 223 S.W. 108 (Mo. 1920). The plaintiffs declare that an ordinance that violates a state statute is void ab initio. True enough. Ordinance 2403, however, is not alleged to violate a state statute. Rather, the plaintiffs claim that the ordinance should be set aside on purely procedural grounds under section 3.14 of the City Charter. Under these circumstances, as shown in the City's substitute brief and the amicus brief of the Attorney General, the appropriate response is severance of the matter outside the scope of the title rather than striking down the entire enactment.

### F. The trial court properly rejected the plaintiffs' other claims.

The plaintiffs' substitute brief shows that the remainder of the trial court's judgment was correctly in favor of the City.

#### 1. A four-sevenths vote was not required.

In their first point relied on (the only point in their cross appeal), the plaintiffs assert that the agreement authorized in Ordinance 2465 was required to be approved by a four-sevenths vote of the people. The Court may note that the plaintiffs have abandoned any claim relating to Ordinance 2403 on this basis. Once again, the plaintiffs attempt to maintain this frivolous argument while ignoring the conclusive authority cited in the

City's brief. The trial court properly entered summary judgment in favor of the City on this claim.

Article VI, Section 26(b), of the Missouri Constitution, provides that, under certain circumstances, cities may not "become indebted" without a four-sevenths vote of the people. The plaintiffs assert that the agreement authorized in Ordinance 2465 represent an indebtedness incurred by the City. As shown in the City's initial brief, an "indebtedness" in this context must be "an ***unconditional*** promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed." *Knowlton v. Ripley County Memorial Hosp.,* 743 S.W.2d 132, 136 (Mo. App. 1988) (quoting *Saleno v. City of Neosho*, 127 Mo. 627, 30 S.W. 190, 192 (1895)) (emphasis added). Where liability under an agreement is contingent, there is no indebtedness as mentioned in Article VI, Section 26(b). *Knowlton,* 743 S.W.2d at 136-37; *St. Charles City-County Library Dist. v. St. Charles Library Building Corp.*, 627 S.W.2d 64, 68 (Mo. App. 1981).

The plaintiffs ignore *Knowlton* and *St. Charles*, as well as the other authority cited on this issue in the City's substitute brief. *See Scroggs v. Kansas City,* 499 S.W.2d 500 (Mo. 1973); *New Liberty Medical & Hosp. Corp. v. E. F. Hutton & Co.*, 474 S.W.2d 1 (Mo. banc 1971); *State ex rel. Thomson v. Giessel,* 72 N.W.2d 577 (Wis. 1955). These cases demonstrate that, when a commitment to pay is subject to appropriation by the municipality, no indebtedness is created. In this case, it is undisputed that, by the plain terms of the agreement between the City and the University, any payments that may be

made by the City would be "subject to annual appropriation by the City Council." L.F. at 137 (¶ 3). Because any payment on the part of the City would be contingent on the City Council's approval of an appropriation, there is no "indebtedness" as the plaintiffs suggest. *Knowlton*, 743 S.W.2d at 136-37; *St. Charles*, 627 S.W.2d at 68; *New Liberty*, 474 S.W.2d at 7.

Despite this clear precedent dooming their claim, the plaintiffs insist that there is an indebtedness. They assert that a portion of the agreement at issue demonstrates that the City's obligation is not contingent. They point to a paragraph of the agreement with the University that states that, "to the fullest extent permitted by law," the City agrees to continue to levy the tax, not to amend or repeal the tax, and not to use the tax proceeds for any purpose other than those set forth in the agreement. L.F. at 138. According to the plaintiffs, under this provision, "the City is locked in tight." Respondent's Substitute Brief at 38.

The plaintiffs' contention is incorrect. The law does not permit the City to limit its own power over the tax. Pursuant to Article X, Section 2, of the Missouri Constitution, the City's power over taxes cannot be surrendered, suspended, or contracted away. The law is well settled that a municipal corporation cannot surrender or contract away its governmental functions and powers. *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626, 629 (banc 1942). "The governing authority of a municipality is not permitted to abdicate through a contract any of its legislative powers and thereby preclude itself from meeting in a proper way the emergencies that may arise." *Id.* "Those powers are conferred in order to be exercised again and again as may be found

needful or politic, and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors." *Id.* A municipality has no power to hamper the free exercise of its legislative discretion. *Id.*

In *Coalition to Preserve Education v. School Dist. of Kansas City*, 649 S.W.2d 533 (Mo. App. 1983), a neighborhood association argued that it had a contract with a school district that required the school district to open a school and keep it in operation for three years. The Missouri Court of Appeals, Western District, held that a commitment to operate a governmental function for a specified period of time, depriving the governmental entity of all discretion to discontinue that function, was unenforceable. *Id.* at 538. "The very reason frequently given for the rule that a municipal corporation cannot contract away its legislative powers is that it would thereby preclude itself from meeting in a proper way any emergencies that may arise." *Id.*

In this case, the plaintiffs appear to assert that the agreement with the University contracts away the City's discretion to determine whether to appropriate tax money. This contention is squarely contrary to the settled law. The agreement authorized by Ordinance 2465 states that, "to the fullest extent permitted by law," the City agrees to continue to levy the tax, not to amend or repeal the tax, and not to use the tax proceeds for any purpose other than those set forth in the agreement. L.F. at 138. The law does not permit this agreement to be a binding commitment that limits the City's authority to enact ordinances in the future. In particular, the agreement cannot tie the hands of future members of the City Council, who are free to enact legislation in their discretion.

The agreement, which explicitly makes any payment by the City "subject to annual appropriation by the City Council," L.F. at 137 (¶ 3), does not create an unconditional indebtedness. Therefore, it was not required to be approved by a four-sevenths vote.

The Court may note that the only authority cited by the plaintiffs on this point is *Grand River Township v. Cooke Sales & Services, Inc.*, 267 S.W.2d 322 (Mo. 1954). This citation is notable for two reasons. First, *Grand River* says absolutely nothing about whether an indebtedness exists. Rather, it deals only with the issue of whether a municipality may undertake a commitment that exceeds the municipality's budget. That issue is not present in this case. Second, the plaintiffs fail to inform the Court that *Grand River* was explicitly overruled by this Court. *Mercantile Bank of Illinois, N.A. v. School Dist. of Osceola*, 834 S.W.2d 737, 741 (Mo. banc 1992). Thus, *Grand River* is not authoritative even on the irrelevant issue for which it stands.

For all of these reasons, the plaintiffs' four-sevenths argument was baseless, and the trial court properly entered summary judgment in favor of the City on Counts II, III, and IV of the second amended petition.

**2. The plaintiffs were not entitled to their attorney fees.**

In their brief, the plaintiffs do not address the issue of whether the trial court properly denied their request for attorney fees. Therefore, they do not dispute that the City was entitled to summary judgment on the plaintiffs' claim for attorney fees under the Hancock Amendment.

### 3. The City has the power to tax hotels and motels.

The plaintiffs do nothing to contest the trial court's entry of summary judgment in favor of the City on the plaintiffs' claim that Ordinance 2403 is illegal and invalid on the theory that it violated Article X, Section 10.1, of the City Charter. The plaintiffs do not dispute that the trial court properly entered summary judgment in favor of the City on Count VII.

### 4. Ordinance 2403 does not violate the City Charter's provision for emergency measures.

The plaintiffs have abandoned their contention that Ordinance 2403 violates Section 3.15 of the City Charter (titled "Emergency Measures"). Therefore, the trial court properly entered summary judgment in favor of the City on this claim.

### 5. Ordinance 2403 does not constitute double taxation.

In the trial court, the plaintiffs alleged that Ordinance 2403 was "void and invalid and unconstitutional" as constituting double taxation. They have abandoned this claim on appeal, and do not contest that the trial court properly rejected it.

### 6. Ordinance 2403 does not impose a sales tax.

In the trial court, the plaintiffs moved for summary judgment on the theory that Ordinance 2403 imposed a sales tax rather than a license tax. L.F. at 168. This erroneous legal theory, however, did not appear in the plaintiffs' initial petition, L.F. at 5, in their first amended petition, L.F. at 13, or in their second amended petition, L.F. at 28. In granting the plaintiffs leave to file their second amended petition, the trial court ordered that it would not entertain any further motions to amend except for good cause.

L.F. at 167. The plaintiffs did not move for leave to amend their claims to add their sales-tax argument. L.F. at 1-4.

The City opposed the plaintiffs' motion for summary judgment on the sales-tax issue on the basis that it had not been pleaded. L.F. at 293-94. The City also demonstrated that the plaintiffs' argument was lacking on the merits. L.F. at 294-99. The trial court entered a judgment granting summary judgment in favor of the plaintiffs on one of their claims and in favor of the City on the plaintiffs' six remaining claims. L.F. at 366. All of the substantive counts asserted in the plaintiffs' second amended petition were resolved by the judgment.

As demonstrated in the City's initial brief, the plaintiffs' sales-tax argument was baseless. Furthermore, it was never asserted in a petition. Therefore, the plaintiffs were not entitled to prevail on this theory. Furthermore, a party is not entitled to complain on appeal that the trial court erred in failing to sustain a motion for summary judgment. *Avanti Petroleum, Inc. v. St. Louis County*, 974 S.W.2d 506 (Mo. App. 1998).

In this Court, the plaintiffs assert for the first time in their Point VI that the trial court erred in failing to rule on their sales-tax motion for summary judgment. As noted in this subpoint and in the jurisdictional statement above, the plaintiffs' Point VI ignores the fact that the trial court considered and ruled on all of the parties' motions for summary judgment. L.F. at 366-67. Second, the plaintiffs' argument ignores the fact that the plaintiffs themselves recognized in the trial court that their sales-tax argument had been resolved in their motion for new trial. L.F. at 375, 380. The plaintiffs requested the trial court to reconsider its decision "that in fact there was no sales tax. . . . We

respectfully request that the court reconsider its ultimate finding with regard to the 'sales tax' issue and grant summary judgment because of the failure of the ordinance (2403) to contain the words 'sales tax' in either the title or the text." L.F. at 380. The plaintiffs' newly minted argument that the trial court failed to rule on the sales-tax motion should be rejected.

The plaintiffs' argument on the merits of the sales-tax issue must be rejected. In its substitute brief, the City pointed out that section 15-396 of the City Code, entitled "Definitions and rules of construction," provides the definition of "gross receipts" for the purposes of section 15-397. L.F. at 257. Under this definition, the City's tax is indisputably distinguishable from the taxes found to be defective in *Suzy's Bar & Grill, Inc. v. Kansas City*, 580 S.W.2d 259 (Mo. banc 1979), and *Anderson v. City of Joplin*, 646 S.W.2d 727 (Mo. 1983).

The plaintiffs' brief ignores section 15-396 entirely. Thus, in arguing that the City's tax applies to sales rather than gross receipts, the plaintiffs would have the Court ignore the very definition of the "gross receipts" to which the tax applies. The plaintiffs' failure to address this section demonstrates the extent to which they must go in an effort to manufacture arguments for appeal.

**G. The Court should enter judgment in favor of the City.**

The plaintiffs do not dispute that Rule 84.14 permits the Court to give such judgment as the trial court ought to have given, if the record permits it. *Miller-Stauch Constr. Co. v. Williams-Bungart Elec., Inc.*, 959 S.W.2d 490, 497 (Mo. App. 1998). The

Court should reverse the judgment of the trial court to the extent that it was in favor of the plaintiffs and enter judgment in favor of the City on all claims.

**II. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS ON THE THEORY THAT ORDINANCE 2403 VIOLATED SECTION 3.14 OF THE CITY CHARTER AND ARTICLE III, SECTION 23, OF THE MISSOURI CONSTITUTION AND THE JUDGMENT SHOULD BE REVERSED IN PART BECAUSE THE PLAINTIFFS MADE NO SHOWING TO NEGATE THE CITY'S ASSERTED AFFIRMATIVE DEFENSE OF ESTOPPEL AND THE UNDISPUTED FACTS SHOW THAT THE PLAINTIFFS ARE ESTOPPED TO ASSERT THE INVALIDITY OF ORDINANCE 2403 IN THAT THE CITY RELIED ON THE PLAINTIFFS' SUPPORT, CONCURRENCE, AND ENCOURAGEMENT IN ENACTING THE ORDINANCE.**

As noted, the trial court erred in entering summary judgment in favor of the plaintiffs on Count V because the undisputed facts show that the City was entitled to judgment as a matter of law on this claim. The Court should reverse the trial court's entry of partial summary judgment in favor of the plaintiffs and enter judgment in favor of the City on Count V.

In the alternative, if the Court were to deny the City's Point I, the judgment must be reversed because, as demonstrated in the City's initial brief, the partial summary judgment in favor of the plaintiffs is defective because the plaintiffs made no effort to refute the affirmative defenses raised in the City's answer. In their brief before this

Court, the plaintiffs essentially concede this point, admitting that they presented no facts to refute the affirmative defense of estoppel.

The plaintiffs appear to assert that the case should be remanded now, without addressing the City's Point I. Respondents' Substitute Brief at 80-81. This contention is baseless. A judgment is final if it disposes of all claims as to all parties and leaves nothing for future determination. Rule 74.01(b); *Snelling v. Masonic Home,* 904 S.W.2d 251, 252 (Mo. App. 1995). The judgment of the trial court is explicitly designated as final. L.F. at 388. There can be no dispute that the judgment before the Court is final and appealable.

Although it is far from clear, the plaintiffs appear to assert that the judgment of the trial court is incomplete because the plaintiffs failed to present any evidence to negate the City's affirmative defenses. In opposing the plaintiffs' motions for summary judgment, the City noted that the plaintiffs had failed to make any effort to negate the City's affirmative defenses. L.F. at 299. The City pointed out that, in order to obtain summary judgment, a plaintiff must establish that there is no genuine dispute as to those material facts upon which it would have had the burden of persuasion at trial. Where the defendant has raised an affirmative defense, a claimant's right to judgment depends just as much on the non-viability of that affirmative defense as it does on the viability of the claimant's claim. It does not matter that the non-movant will bear the burden on this issue at trial. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993). In this Court, the plaintiffs effectively concede that they failed to present any evidence to negate the City's affirmative defenses, but it is

undisputed that the trial court entered summary judgment in favor of the plaintiffs. L.F. at 366.

The plaintiffs seem to claim that the trial court failed to resolve some issue in regard to the affirmative defenses. This assertion is incorrect. It is undisputed that the trial court took up and resolved the parties' motions for summary judgment. In ruling in favor of the plaintiffs, the court implicitly resolved the affirmative defenses in the plaintiffs' favor. While the City believes that this issue was decided erroneously, the trial court did decide it. The effect of the plaintiffs' failure to negate the City's affirmative defenses is that the judgment in favor of the plaintiffs should be reversed, not that the appeal should be dismissed. The plaintiffs' contention that the trial court failed to resolve the affirmative defenses is unsupported by the record or any citation to authority.

The Court should address the claims raised in the City's Point I. If the Court decides Point I against the City, the partial summary judgment in favor of the plaintiffs should be reversed in accordance with the plaintiffs' stipulation that they failed to negate the City's affirmative defenses.

## CONCLUSION

The undisputed facts show that Ordinance 2403 and Ordinance 2465 are valid and enforceable. The City was entitled to judgment as a matter of law. The Court should reverse the judgment of the trial court to the extent that it was in favor of the plaintiffs and enter judgment in favor of Defendant City of Cape Girardeau, Missouri, on all claims.

In the alternative, if the Court finds the title of Ordinance 2403 to be underinclusive, the Court should follow its longstanding precedents and sever the portions that it finds to be offensive and hold the remainder to be effective.

Respectfully submitted,


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## RULE 84.06 CERTIFICATE

1. a. The undersigned certifies pursuant to Rule 55.03(a) that this brief is signed by at least one attorney of record in the attorney's individual name. The signer's address, Missouri bar number, and telephone number are as follows:

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The undersigned certifies that this brief is not verified or accompanied by affidavit.

b. The undersigned certifies pursuant to Rule 55.03(b) to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that: (1) the matters set forth in this brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the matters set forth in this brief are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c. The undersigned certifies pursuant to Rule 55.03(c) that this brief does not seek sanctions.

2. The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b).

3. Relying on the word and line count of the word-processing system used to prepare this brief, the undersigned certifies that this brief contains 9,346 words and 843 lines of text.

4. Pursuant to Rule 84.06(g), the undersigned certifies that the disks containing this brief that are filed with the Court and served on the parties have been scanned for viruses and that they are virus-free.

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Jeffery T. McPherson

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this brief and a disk containing the brief were mailed, first-class postage prepaid, on December 12, 2001, to:

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